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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Fifteenth session

SUMMARY RECORD OF THE 45th MEETING

Held at the Palais des Nations, Geneva
on Friday, 29 November 1996, at 10.a.m.

Chairperson: Mr. ALSTON

CONTENTS

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (continued)

Draft optional protocol (continued)

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The meeting was called to order at 10.20 a.m.

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (agenda item 3) (continued)

Draft optional protocol (continued) (E/C.12/1996/CRP.2/Add.1)

1. The CHAIRPERSON invited members who had not had the opportunity to speak at the previous meeting to make general comments on the revised report which he had prepared on the draft optional protocol to the Covenant (E/C.12/1996/CRP.2/Add.1). The Committee could thereafter revert to the issue of the advisability of including a reference to an inter-State complaints procedure in the draft text.

2. Ms. TAYA said that she was not in favour of adopting the draft optional protocol as it stood principally for two reasons. First, it failed to deal with the very important issue of grave, mass and successive violations of economic, social and cultural rights in developing countries. Secondly, the draft text did not take full advantage of the possibility afforded under articles 22 and 23 of the Covenant to bring certain matters to the attention of other United Nations bodies and specialized agencies relating to their policy-making for the purpose of the more effective implementation of the rights set forth in the instrument. She questioned the merits of having a protocol that was very limited in coverage, and also based too closely on the first Optional Protocol to the International Covenant on Civil and Political Rights. Although civil and political rights were inextricably linked with economic, social and cultural rights, the means of enforcing them need not necessarily be the same.

3. The Committee had already improved its procedures for examining State party reports and for hearings of non-governmental organizations (NGOs). The input now provided by a wide range of NGOs on general matters and more specific cases was of great assistance to the Committee in its dialogue with reporting countries and in the drafting of non-binding concluding observations. In view of the success achieved thus far, it might be worthwhile to consider further enhancing those procedures rather than adopting an optional protocol. That would have the advantage of covering all States parties to the Covenant, as well as the full range of rights set forth in the Covenant. It would also be a simpler and less time-consuming option.

4. She was greatly concerned by United Nations budgetary constraints and the need to find the most effective way of enforcing the Covenant in order to address the gravest violations, and feared that an optional protocol might merely serve to duplicate and complicate existing procedures. Furthermore, the inter-State complaints procedure posed both practical and legal problems. The most serious violations of the rights covered by the Covenant often resulted from the development policies of United Nations agencies, financial institutions such as the World Bank, and recipient countries themselves regarding the use of bilateral and multilateral foreign aid. The complaints procedure could not be applied to institutions such as the World Bank, which was not a party to the Covenant. In the case of bilateral aid, it seemed inappropriate for a complaint to be lodged against the donor country. However, when it was established that the complaint did concern such bodies,

perhaps the recommendations subsequently adopted might be addressed directly to them. Such a procedure would be in keeping with articles 22 and 23 of the Covenant.

5. Mrs. JIMENEZ BUTRAGUEÑO said that Ms. Taya's statement had raised a number of interesting issues regarding development and financial aid that warranted due consideration by the Committee. However, that did not necessarily preclude the adoption of the draft optional protocol.

6. Mr. GRISSA said he was aware that many members believed it was premature to adopt an optional protocol. The Committee was spending a good deal of time on an issue that did not have the support of all members. He endorsed the arguments against adopting the draft optional protocol put forward by Ms. Taya.

7. Mrs. BONOAN-DANDAN said that the Committee's manner of proceeding was quite unacceptable. It must carry through its earlier decision to adopt a draft optional protocol at the current session.

8. The CHAIRPERSON said that it would be difficult for the Committee at the current juncture to review its decision to submit a draft optional protocol to the Commission on Human Rights; the matter had been taken up by the World Conference on Human Rights and the Commission itself had been informed that the Committee would finalize a text by the end of the current session. It was understood that mention would be made in the report submitted to the Commission of any dissenting views concerning the undertaking as a whole, or, as in Mr. Grissa's case, on more specific aspects.

9. His response to Ms. Taya's statement was that the draft optional protocol was not intended to provide a comprehensive solution; for that, the Committee required a variety of procedures. There was no doubt that Ms. Taya had been instrumental in encouraging the Committee to focus on the activities of international development agencies with good results, and it was hoped that such efforts would be pursued. However, the Committee could not expect such bodies to agree to be bound legally by a complaints procedure.

10. Ms. Taya had attached great importance to the issue of gross violations, but it was well known that where they occurred the State parties concerned often did not report and would be unlikely to comply with an optional protocol. Furthermore a procedure that focused on such violations would in practice be rather discriminatory since it would mainly target the developing countries where such violations tended to occur.

11. The main aim of the optional protocol was to allow the Committee to build up a body of jurisprudence; thus, even though a particular case considered might involve only one State party or a handful of individuals, the Committee's decisions could eventually have a multiplier effect. The objectives outlined by Ms. Taya were indeed important, but could for the most part be achieved by other means. There were other essential objectives, however, that could be attained only through the adoption of an optional protocol.

12. Mr. SIMMA endorsed the Chairperson's remarks. The Committee had a commitment to complete its draft of the optional protocol at the current session. He recalled that, in the past, Ms. Taya had mentioned the possibility of submitting separate proposals, which might result in another protocol. Perhaps, therefore, the best way forward would be to deal with her proposals separately once the Committee had completed its consideration of the draft optional protocol in question.

13. Mr. ALVAREZ VITA said that Ms. Taya was to be congratulated on being bold enough to speak her mind. He would refrain from comment on the substance of her statement for the time being, and would merely say that she had fully grasped what many members perceived to be the hub of the issue.

14. The CHAIRPERSON suggested that the Committee should revert to the issue of the inter-State complaints procedure and inquired as to the outcome of the informal consultations on the subject.

15. Mr. ALVAREZ VITA said that, although his initial stance on the inter-State complaints procedure remained unchanged, he did not wish to go against the consensus of the Committee. The relevant summary records would accurately reflect the different views expressed on the issue. That being said, his main concern was that the Committee was not making fast enough progress with the optional protocol to keep up with developments in the field of human rights.

16. Responding to a question from Ms. TAYA, the CHAIRPERSON recalled the Committee's earlier agreement that consensus, although desirable, was not required: the report on the draft optional protocol could indicate any disagreement either by individuals or by a group of members, and set out the various options available.

17. Ms. TAYA suggested a roll-call vote on the issue, with members' views being recorded in the report of the Committee to the Commission.

18. The CHAIRPERSON pointed out that the summary records dealing with the Committee's discussion of the issue would be available to the members of the Commission, as well as to any other interested parties. If the Committee's report to the Commission were to contain such detailed information, it would probably exceed the stipulated page limit for such documentation. More importantly, a roll-call vote would greatly undermine the esprit de corps that had prevailed in the Committee thus far and would set an unfortunate precedent for a human rights treaty body.

19. Mrs. BONOAN-DANDAN, supported by Mrs. JIMENEZ BUTRAGUEÑO, urged members to avoid a vote and to work towards achieving a consensus.

20. Mr. GRISSA said that he had made his position quite clear regarding the question of consensus at an earlier meeting. He would refrain from making any further comment until the conclusion of the debate, but would then request a vote and stand against the Committee's generally favourable view concerning the draft optional protocol.

21. After a procedural discussion in which Mr. SIMMA, Mr. CEAUSU, Mr. KOUZNETSOV, Mr. ALVAREZ VITA, Mr. ADEKUOYE, Mr. WIMER ZAMBRANO and Mr. THAPALIA took part, the CHAIRPERSON noted that there appeared to be a general agreement that the Committee should pursue its consideration of the revised report. It also seemed to be agreed that a provision for an inter-State complaint procedure should not be included in the draft optional protocol. In its report, the Committee could state that it had discussed the advantages and disadvantages of such a procedure and had decided not to recommend its inclusion; alternatively, it could delete any mention of it.

22. Mr. SIMMA said that he was in favour of indicating the reasons for not including a provision for an inter-State procedure.

23. Mr. WIMER ZAMBRANO remarked that such a course of action would simply reopen the debate. The reasons should not be included in the report: those interested in knowing them could read the summary records.

24. In response to a suggestion by Mr. SIMMA, the CHAIRPERSON said that the simplest solution would be for the Committee to quote paragraph 12 of the revised report and then, indicating the relevant summary records, state that it had discussed the issue and had decided against the inclusion of such a provision.

25. Mr. ALVAREZ VITA said that the same approach would need to be applied to other parts of the draft optical protocol to avoid imbalance and suggested that a decision should be taken regarding any further explanatory text that might seem necessary.

26. The CHAIRPERSON said that, if he heard no objection, he would take it that the Committee wished to follow that procedure. In the case currently under consideration, he proposed that the report should include the text of paragraph 12, of the revised report, together with the additions he had already mentioned.

27. It was so decided.

28. The CHAIRPERSON invited comments on the section of the revised report concerning the preamble to the proposed optional protocol (paras. 14 and 15). He drew attention to a proposal made the previous day for the inclusion of a specific quotation from article 2 (1) of the Covenant recalling the nature of the obligations which States undertook in ratifying the Covenant.

29. Mr. MARCHAN ROMERO proposed a number of amendments to the draft text of the preamble. In addition to a reference to the terms of article 2 (1) of the Covenant the preamble should include a paragraph stressing: that the possibility of submitting complaints regarding violations of economic, social and cultural rights by the subjects of those rights was a necessary recourse to guarantee the full exercise of such rights. Moreover, the Spanish word "capacitar" in the last paragraph should be replaced by the word "facultar", and the order of the first and second paragraphs should be reversed, since the second was the broader of the two.

30. Mr. SIMMA said that he supported those amendments but would prefer the word "enable" to remain in the English text.

31. Mr. ALVAREZ VITA also supported the amendments but expressed some doubt as to whether "facultar" would be the most appropriate word in Spanish. He also questioned the use of the word "reconocía" in the first paragraph, which should read "reconoció".

32. Mrs. JIMENEZ BUTRAGUEÑO said that she, too, agreed with Mr. Marchan Romero's amendments. The preamble might furthermore include a reference to the general comment mentioned by Mr. Ceasu.

33. Mr. WIMER ZAMBRANO suggested that the Spanish-speaking members of the Committee should meet informally to decide on the most appropriate Spanish wording. Footnotes could be used for any explanations needed. In the second paragraph, the word "Convinced" could be replaced by a word such as "Reaffirming".

34. The CHAIRPERSON said that, in the absence of any objection, he would take it that the Committee wished to adopt those proposals, it being understood that the wording of the Spanish text would be reviewed. The report would indicate that in the course of discussion the Committee had agreed to include several additional paragraphs in the preamble.

35. It was so decided.

36. The CHAIRPERSON, referring members to the section of the revised report concerning recognition of the Committee's competence, invited comments on the first issue, namely whether the complaints procedure should deal with situations on an individual or collective basis, or both (paras. 17 and 18).

37. Mr. SIMMA said that he would have preferred the text as a whole to have been arranged by article, each being followed by a commentary. Care should be taken not to imply or state an obligation where there was none (as in "obliging" in the last sentence of para. 17). The issue as to whether the complaints procedure should deal with situations on an individual or collective basis, or both, was crucial. He was in favour of the individual approach, but if the Committee were to opt for a procedure as under the European Social Charter, all subsequent proposals in the paper submitted by the Chairperson would need to be altered since it was currently based on the precedent of the first Optional Protocol to the International Covenant on Civil and Political Rights.

38. The CHAIRPERSON said that he agreed to some extent with the previous speaker, but if the Committee opted for a collective approach, some of the issues in the remainder of the draft would still need to be examined.

39. Mr. MARCHAN ROMERO said that the procedure should deal with situations involving both individuals and groups. There was, however, a need to allay fears that the body processing complaints might be submerged by an avalanche of individual submissions relating, for example, to unemployment or to epidemics, particularly in developing countries. Certain procedural requirements would have to be defined to cover all types of complaints.

40. Mr. ALVAREZ VITA said that an individual approach would be in line with the basic intent of the proposed protocol to protect the human person. He therefore saw no reason not to allow individual as well as collective complaints.

41. Mrs. JIMENEZ BUTRAGUEÑO agreed with the previous speakers. The Additional Protocol to the European Social Charter was surely an exception in not allowing individual complaints.

42. Mr. KOUZNETSOV suggested devising a procedure for processing both types of submission: the Covenant focused in some cases on the rights of individuals, and elsewhere on collective rights, such as trade union rights.

43. Mrs. BONOAN-DANDAN said that her experience indicated that the collective approach would be the most appropriate, since the Covenant covered a range of rights that belonged to collective groups. However, she would go along with the view that the Committee must not close the door to an individual where rights were threatened.

44. Mr. SIMMA said that there was a potential confusion between the right to submit a collective complaint and rights enjoyed by persons belonging to a "collectivity". To take one of the cases he had raised in connection with the report concerning Hong Kong, a person such as the one who had been tear-gassed and become ill in a detention centre should have the right to submit an individual complaint. The inmates of the detention centre as a group could, by the same token, be said to have the right to submit a collective complaint. He could accept the views that submissions from groups should be allowed, provided that - as stated in the proposed text of article 1 - they were groups "who claim to be victims of a violation" (para. 38).

45. Mr. CEAUSU said that he would prefer the proposed protocol to refer only to communications from individuals, since the rights set forth in the Covenant were exercised individually, or in common with other individuals in society.

46. The CHAIRPERSON said it was his understanding that the Committee was in favour of pursuing the idea of a procedure covering probably both individual and collective complaints and that it was in any event against a procedure that was solely collective, within the meaning of the Additional Protocol to the European Social Charter. He took it that the Committee wished to indicate in the report that it had been aware of the precedent set in the European Social Charter approach, but that there had been a clear consensus view that it was not the best procedure to follow in the given case.

47. It was so decided.

48. The CHAIRPERSON invited the Committee to comment on the issue raised in paragraphs 19 to 21 as to whether the proposed protocol should refer to a "violation" or to a failure by the State party to give effect to its obligations under the Covenant. The discussions thus far had tended towards the first formulation.

49. Mr. WIMER ZAMBRANO, supported by Mrs. JIMENEZ BUTRAGUEÑO, said that both phrases should be retained, as that would give the Committee greater flexibility in the future in assessing situations of varying gravity and involving different types of rights.

50. Mr. SIMMA, noting the need to clarify the legal difference between the two formulations, said it was his understanding that a failure to comply with obligations did not necessarily amount to a violation. Additional elements had to be present for a violation to be said to have occurred.

51. The CHAIRPERSON said that not reporting or not complying with a particular decision of the Committee would be examples of failure to give effect to obligations.

52. Mr. SIMMA expressed support for the term "violation". It would fit logically with the subsequent references to "domestic remedies" in the text.

53. Mr. MARCHAN ROMERO said that he appreciated the value of euphemistic language, but the whole point of the proposed protocol was to provide for recourse in the case of a "violation" of a right laid down in the Covenant. Unless that term was used, the Committee would not be able to speak of compensation.

54. Mr. KOUZNETSOV said that the proposed protocol should deal only with violations, such as resulted from deliberate failure to comply with the Covenant. Non-compliance could, after all, result also from an inability to meet obligations owing, for example, to a lack of resources. That might temporarily free a State from responsibility.

55. Mr. WIMER ZAMBRANO said that it was difficult to perceive the intent of a State in failing to comply with a particular obligation. Sometimes, the non-compliance was only minor, and the term "violation" was thus not in order. All regions believing in sin distinguished between mortal and lesser sins. There were varying degrees of violation, ranging from acts of commission to acts of omission, and the Committee must be free to use either formulation to nuance its position depending on the nature and degree of the violation.

56. Mr. MARCHAN ROMERO said that there already existed a forum for dealing with "lesser sins": the Committee's consideration of reports of States parties, when such failings as non-compliance with the Covenant or failure to report could be noted. The aim of the optional protocol was to provide recourse for the violation of an individual's rights, on which the Committee currently had no power to act.

57. Mr. SIMMA said that while the Covenant contained both rights and obligations there were some obligations on States that did not carry a correlative right for the individual. It would be nonsensical, for example, for an individual to be able to lodge a complaint about a Government's failure to report. On the other hand, there were issues that were of importance to an individual but might seem of insignificance to a State. He was in agreement with Mr. Wimer Zambrano; they had simply misunderstood each other's terminology.

58. Mr. CEAUSU said that it would be more productive for members to indulge in less theoretical discussion and to propose specific amendments where they considered necessary.

59. Mr. SIMMA said that the discussion pointed up the disadvantages of the step-by-step approach. All parts of the text were interrelated; draft article 1, for example, had a crucial bearing on the preamble.

60. The CHAIRPERSON suggested that the Committee should defer a decision on whether to retain the term "violation"; the issue might become clear as the discussion proceeded. Meanwhile, the Committee might consider the third and fourth issues (paras. 22-25). The third had been decided already, in the sense that all were agreed that the communications procedure should not be restricted to individuals but should extend to groups. The fourth issue concerned the nature of the standing that an individual or a group should have in order to be entitled to make a complaint. The Human Rights Committee interpreted article 1 of the first Optional Protocol to the International Covenant on Civil and Political Rights as allowing an NGO acting on behalf of a number of victims to approach the Committee; but such an organization with no direct link would not be able to submit a communication. He invited comments on whether the wording "individuals or groups" in draft article 1 should stand.

61. Mr. SIMMA said that it was a most important question, inasmuch as a State was often less afraid of an individual than of an alert NGO. As it stood, draft article 1 suggested that the members of a group should themselves be victims of a violation. If the formula "speaking on behalf of any individuals or groups" was adopted, there was a danger that an NGO could take up an individual's cause, without authorization, to destructive effect. He therefore asked for an authoritative interpretation of what the proposed amendment would mean.

62. The CHAIRPERSON said that it was the practice of the Human Rights Committee not to accept a complaint from an NGO on behalf of an alleged victim unless it could demonstrate that consent had been obtained from the victim or those close to the victim. He granted that the wording of draft article 1 could be seen as restrictive, but the essence of the provision was that one or more individuals would have to be party to the complaint. The Committee would presumably develop a practice similar to that of the Human Rights Committee, which reasoned that a draconian Government should not be rewarded for holding a victim incommunicado, without the opportunity to be represented.

63. Mr. MARCHAN ROMERO was inclined to think that the text should not distinguish between groups and NGOs; the present wording should be retained. Procedurally, there was no reason why individuals or groups should not empower others to represent them, as a lawyer represented a client in court.

64. Mr. SIMMA agreed, but drew a distinction between representation of a victim by a lawyer and by an NGO, which in his experience could never be characterized as a victim itself. In that case, the wording of draft article 1 might be too narrow, applying only to groups that were actually victimized.

65. The CHAIRPERSON said that no amendment could possibly eliminate the need for interpretation by the Committee. The Human Rights Committee had often had to decide its own interpretation of the fairly straightforward wording of the first Optional Protocol.

66. Mr. SIMMA pointed out that the first Optional Protocol made no mention of groups; it was that very fact that enabled the Human Rights Committee to put a wider interpretation on its provisions. Including a reference to groups would, if anything, hamstring the Committee.

67. The CHAIRPERSON suggested that if it was correct that the wording as it stood would prevent Amnesty International, for example, from approaching the Committee on behalf of one or two people in a specific group, the problem might be solved by amending the fourth line to read "one or more of whose members claim to be victims ...".

68. Mr. SIMMA said that the proposal was not a complete solution. If two trade unionists were attacked in the street, for example, it would be hard to establish whether their trade union activities were responsible for the attack. Also, members of a group might not be able to file a complaint on behalf of other members of the group. He could accept the proposal but warned that the wording could be restrictive.

69. Mr. MARCHAN ROMERO said that it was important to make it clear that members of a group, not themselves victims, could complain on behalf of members who were victims. He supported the Chairperson's proposed amendment.

70. Mr. WIMER ZAMBRANO said that the Committee was in danger of making complicated that which was simple. The text was clear as it stood and fell within the Committee's mandate. One or two members of a group could, after all, complain in their individual capacity.

71. Mrs. BONOAN-DANDAN said that the current wording would exclude any NGO because it was not a victim. Yet most victims were not in a position to address the Committee directly, even if they knew about it. Their cause could be fought only by NGOs, the importance of whose role must therefore be reflected in the text.

72. The CHAIRPERSON suggested that amending the third line to read "any individuals or groups acting on behalf of individuals" would cover any objections.

73. Mrs. JIMENEZ BUTRAGUEÑO said that there were three kinds of group: those victimized as a group, those victimized individually but complaining jointly and those acting on behalf of others. The procedure should cater for them all.

74. Mr. WIMER ZAMBRANO suggested that the difficulty could easily be resolved by inserting "or who represent victims" after the word "victims".

75. Mr. CEAUSU said that the Committee's concerns could be met by amending draft article 2, paragraph 1, with the addition of the sentence "Such a

communication may also be submitted on their behalf by any human rights non-governmental organization." In other words, it should be treated as a matter of procedure, not a right in itself.

76. Mr. SIMMA supported that suggestion, which clarified the situation even more than Mr. Wimer Zambrano's proposed amendment. At some point in the text, however, there would have to be a statement on the admissibility of a group bringing a claim on behalf of an individual, so as to ensure that it had the necessary authorization.

77. The CHAIRPERSON suggested that further informal consultation should take place and that a decision should be deferred to a later meeting.

The meeting rose at 1 p.m.